

APR 13 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Request for Review In Part
of Fund Administrator's Explanation
of Funding Commitment Decisions
by Integrated Systems and
Internet Solutions, Inc.

CC Docket No. 97-21

Application No. 18132

ALTERNATIVE MOTION FOR LEAVE TO FILE OF EDUCATION NETWORKS OF AMERICA

Education Networks of America (ENA), by its attorneys, hereby requests leave to file its Opposition in the above-captioned matter, to the extent necessary, if the Bureau were to determine that the Opposition was filed outside the time limits prescribed by Section 54.721(d) of the Commission's rules.¹

Although ENA believes its Opposition is being filed in a timely manner, there is some ambiguity surrounding the Opposition due date. In particular, the Commission's Report and Order adopting procedures for seeking review of decisions of the Administrator of the Schools and Libraries Division of the Universal Service Administrative Company provides that parties seeking to respond to a request for review shall file an "Opposition" in accordance with the filing requirements in Section

¹ 47 C.F.R. § 54.721(d). ENA is filing its Opposition contemporaneously with this Motion in the above-captioned docket. A copy of the Opposition is attached for reference by the Bureau.

1.45 of the Commission's rules.² Indeed, that Order states that parties "shall adhere to the time periods for filing oppositions and replies set forth in 47 C.F.R. § 1.45."³

The Section 1.45 filing requirements were incorporated by reference in Section 54.720(e) of the Commission's rules, which governs the filing deadlines for pleadings in connection with the review of an Administrator's decision.⁴ Based upon that rule and Section 1.45, the Opposition due date is April 13, 1999. It has come to our attention, however, that a potential ambiguity exists given that a similar filing deadline was not apparently incorporated into Section 54.721(d) of the Commission's rules, which sets forth the general filing rules associated with a request for review of an Administrator's decision.⁵

In light of this ambiguity, ENA is, out of an abundance of caution, respectfully requesting leave to file its Opposition. In support of this request, ENA notes that counsel for Integrated Systems and Internet Solutions, Inc. (ISIS 2000), the party to which ENA's Opposition principally refers, has represented to ENA that it intends to file its Opposition in the above-captioned proceeding on April 13, 1999. Moreover, the Commission's docket in the above-captioned matter indicates that no other party apparently has filed a similar Opposition prior to April 13, 1999.

² In the Matter of Changes to the NECA Board of Directors, CC Docket No. 97-21, CC Docket No. 96-45, FCC 98-306, ¶ 71 (rel. Nov. 20, 1998) ("Order").

³ *Id.* at ¶ 71 n.198.

⁴ 47 C.F.R. § 54.720(e).

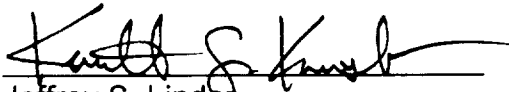
⁵ See 47 C.F.R. § 54.721(d).

Accordingly, if its Opposition was in fact due earlier, ENA submits that acceptance of its pleading on this date will not prejudice ISIS 2000 or any other party. In addition, acceptance of its Opposition will serve the public interest in compilation of a full and complete record.

For the reasons set forth above, ENA requests that, to the extent necessary, this Alternative Motion For Leave to File be granted.

Respectfully submitted,

EDUCATION NETWORKS OF AMERICA

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April 13, 1999

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Alternative Motion for Leave to File was served today, the 13th day of April, 1999, by first class mail, postage pre-paid on the following parties:

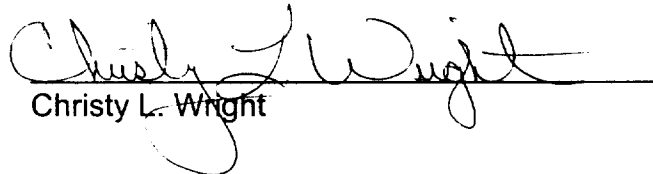
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Request for Review In Part)	CC Docket No. 96-45
of Fund Administrator's Explanation)	CC Docket No. 97-21
of Funding Commitment Decision)	
By Integrated Systems and)	
Internet Solutions, Inc.)	
)	Application No. 18132
To: Common Carrier Bureau		

**OPPOSITION OF
EDUCATION NETWORKS OF AMERICA**

Education Networks of America ("ENA"), by its attorneys and pursuant to Sections 1.45 and 54.721 of the Commission's Rules,¹ respectfully submits this Opposition to the Request for Review ("Request") filed by ISIS 2000 regarding the State of Tennessee's above-captioned application. In its Request appealing the decision of the Administrator of the Schools and Libraries Division of the Universal Service Administrative Company (the "Administrator"), ISIS 2000 persists in its distortion of the law and facts in seeking reversal of the Administrator's decision confirming the award of the Tennessee contract to ENA.²

¹ 47 C.F.R. § 1.45; 47 C.F.R. § 54.721(d). To the extent necessary, ENA has filed contemporaneously in the above-captioned docket an Alternative Motion For Leave to File given the potential ambiguity in the Commission's rules concerning the Opposition due date.

² See Request for Review in Part of Fund Administrator's Explanation of Funding Commitment Decisions, CC Docket No. 96-45, CC Docket No. 97-21, Integrated Systems and Internet Solutions, Inc. (filed Mar. 29, 1999) ("ISIS 2000 Request").

The Administrator correctly “confirmed that the state and local processes for competitive bid procurement [were] followed” and declined to revisit anew ISIS 2000’s claims that “the ENA bid was not the most cost effective bid.”³ Such a finding follows the dismissal of ISIS 2000’s state bid protest, which was twice found to be without merit. Moreover, ISIS 2000 did not seek review of these State administrative determinations using the available judicial review process provided for under state law.

Rather, its Request is merely the latest attempt (in a series of filings made before this agency) by a disgruntled bidder to thwart the State of Tennessee’s efforts to deliver high quality and cost-effective Internet access to its over 900,000 students through the contract awarded to ENA. ISIS 2000 raises no new or compelling justification to reverse the Administrator’s decision. The Commission thus should decline to reopen this issue on the basis of ISIS 2000’s repetitive allegations and should promptly deny ISIS 2000’s Request.

ISIS 2000’s Request is premised upon a mischaracterization of the Commission’s competitive bidding requirement. ISIS 2000 mistakenly claims that the State’s award to ENA is flawed because of the criteria the State used in evaluating costs.⁴ This assertion fundamentally misinterprets the Commission’s universal service

³ See Letter from Debra M. Kriete, General Counsel to Schools and Libraries Division, Universal Service Administrative Company to William K. Coulter, Esq., Jeffrey S. Linder, Esq. and Ramsey L. Woodworth, Esq., at 2 (Feb. 26, 1999) (“Administrator’s Decision”).

⁴ ISIS 2000 Request at 4-6.

eligibility rules and is at odds with the conclusions reached by the relevant state agencies responsible for reviewing the State's procurement.

Section 54.504 of the Commission's rules requires that an eligible school "seek competitive bids, pursuant to the requirements established in this subpart, for all [eligible] services" and that such requirements shall apply "in addition to state and local competitive bid requirements."⁵ Along with the administrative requirements of that section (such as the Form 470 posting process), Section 54.511 provides that, in selecting a service provider, an applicant "shall carefully consider all bids submitted and may consider relevant factors other than pre-discount prices submitted by providers."⁶ In adopting this provision, the Commission explained that, while "price should be the primary factor in selecting a bid," other factors such as "prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance, and environmental objectives" may be used to "form a reasonable basis on which to evaluate whether an offering is cost effective."⁷

The State clearly followed these procedures in awarding its contract for Internet access service to ENA. Plainly, the State sought and received competitive bids (from ISIS 2000 and ENA) and evaluated these proposals based upon four enumerated criteria (cost, technical approach, bidder experience, and bidder qualifications), which are all contemplated by the Commission's rules and were considered individually by the

⁵ 47 C.F.R. § 54.504.

⁶ 47 C.F.R. § 54.511.

⁷ Universal Service Order, ¶ 481.

State.⁸ ENA was awarded the contract over ISIS 2000 on the basis of a cost-effective approach to providing service and a clearly superior technical proposal (a 36 percent higher rating).⁹ Moreover, the integrity of this procurement process and the superiority of ENA's proposal were upheld by the relevant state contract appeal authorities, which determined that ISIS 2000's protest was without merit.¹⁰

ISIS 2000 may not reasonably avoid this conclusion now by mischaracterizing the Commission's rules and asserting that the State's procurement (to which it was a party and did not earlier object either before the State or any court) was flawed because it was compelled to "consider only pre-discount price in evaluating cost considerations."¹¹ As explained above, there simply is no such explicit and bright-line requirement to consider exclusively pre-discount cost as a predicate to complying with the Commission's rules.

The State's procurement process neither failed to consider pre-discount price nor encouraged bidders to "game" the USF program. ISIS 2000 argues that "the cost evaluation used by the Department, on their face, involved no evaluation

⁸ See 47 C.F.R. §§ 54.504, 54.511. In addition, the State's procurement procedures dictate that it not even consider the cost proposals until the technical evaluations are completed.

⁹ See Opposition of Education Networks of America, CC Docket No. 96-45, Attachment 3 (filed April 20, 1998) ("ENA Opposition").

¹⁰ See ENA Opposition at 8 for a discussion of the State of Tennessee's bid protest proceeding.

¹¹ ISIS 2000 Request at 4.

whatsoever of pre-discount cost considerations.”¹² This simply is not true; the State's procurement criteria did take into account pre-discount price. Indeed, a bidder's pre-discount price is the numerator of the State's cost evaluation formula used to calculate the number of points for the low-cost bid and the denominator is the State's net cost portion.¹³ Accordingly, there is no question that pre-discount price level was relevant to the State's procurement decision.

Nor can ISIS 2000 legitimately claim that the State's procurement process was “an open invitation for a bidder to ‘game’ the USF funding process as much as possible.”¹⁴ First, in contrast to ISIS 2000's assertion, the State's cost evaluation formula encouraged bidders to reduce expenditures by the State and the federal universal service fund. As ENA recognized, this is so because a bidder was rewarded with a greater number of cost index points as it reduced the total amount of the State's expenditure, which also reduced the amount of eligible federal universal service funding. As the Commission is aware, the amount of federal USF support is tied directly to the amount of money spent by a state, thereby encouraging states to make most efficient use of the fund's limited resources.

Second, it would be illogical, as ISIS 2000 seems to suggest, to limit a state's discretion to award a contract to a bidder who proposes services that are consistent

¹² ISIS 2000 Request at 6.

¹³ The State's methodology of calculating the “cost factor” and the amount of points awarded on the basis of cost is detailed in Section 6.2.7 of the State's procurement guidelines attached as Attachment A hereto.

¹⁴ ISIS 2000 Request at 7.

with the state's bid criteria and eligible to receive discounts under the fund. The fundamental purpose behind the schools and libraries program is to encourage schools and libraries to purchase Internet access and eligible telecommunications services so as to directly benefit students and enrich the learning environment. In providing for discounts on specific covered services, Congress thus sought to assist these entities in maximizing their ability to purchase such services over other non-eligible alternatives.¹⁵

The integrity and accuracy of the State of Tennessee's procurement process was affirmed both by the State's Commissioner of Education and by the State Review Committee in dismissing ISIS 2000's bid protest. The State clearly and carefully evaluated both ENA's and ISIS 2000's proposals consistent with the stated methodology of its request for proposal, which included all factors deemed relevant by the Commission and state authorities. Thus, ISIS 2000's claim that the procurement process was "gamed" is flatly wrong.

ISIS 2000 incorrectly claims that it was the low cost bidder. ISIS 2000 also incorrectly argues that the State's alleged failure to comply with the competitive bidding requirements gave ENA a "decisive preference" on cost factors over ISIS 2000.¹⁶ Specifically, it incredulously claims that the State favored ENA's "substantially more

¹⁵ The State's cost formula coupled with the technical evaluation criteria allowed it to balance carefully the tradeoff in a bidder's proposal between cost and service factors. In other words, these criteria allowed the State to consider differences between a bid that maximized service levels to the State for each state and federal USF dollar invested and a bid that proposed a lower service level coupled with a lower pre-discount cost.

¹⁶ ISIS 2000 Request at 7.

expensive pre-discount price. . . strictly because it was the more expensive pre-discount price and contemplated more USF funding.”¹⁷ This statement is belied by the record and the conclusions reached by the State.

ISIS 2000’s claim that it was the low cost bidder is misleading. The \$51,275,384 figure quoted by ISIS 2000 in its Request is the cost estimate that was found by the State during the course of its procurement review process to be significantly understated (a conclusion never refuted by ISIS 2000). As the State found in its review, the ISIS 2000 bid at the “best case” more properly should be approximately \$75 million, which represents an increase of nearly \$24 million.¹⁸ The State further concluded that the total estimated price of ISIS 2000’s bid would rise to approximately \$187 million if these estimates were extended over the entire anticipated 42 month contract term, which would make it substantially more than ENA’s proposed cost of approximately \$74 million.¹⁹ Based upon these findings, the State determined that ISIS 2000 was not the low cost bidder. Notably, ISIS 2000 neither refuted these findings nor availed itself of any judicial remedy designed to specifically provide for challenges to State administrative determinations.

The State was justified in finding that ENA’s proposal was superior to that of ISIS 2000 in every respect. Even accepting ISIS 2000’s cost argument as true (which it is not), the State was fully justified in awarding the contract to ENA. Indeed,

¹⁷ ISIS 2000 Request at 7.

¹⁸ See ENA Opposition at 9-11.

¹⁹ *Id.*

the State's summary evaluation matrix attached to ISIS 2000's Request shows that ENA's proposal was rated higher than ISIS 2000 in all four bid evaluation categories (qualifications, experience, technical approach, and cost).²⁰ The scoring disparity between ISIS 2000's and ENA's technical approach is significant (approximately 36 percent) and provides the State with a substantial basis to award the bid to ENA. Out of a possible 45 points for technical merit (which amounts to nearly half of the weighted scoring), ENA received an average score of 35.375, while ISIS 2000 received a score of only 26.²¹

Moreover, ISIS 2000's low score for technical merit accurately reflects its unworkable and vastly inferior solution. The differences between the service levels proposed by ISIS 2000 and ENA are stark:

- ENA will provide essentially instantaneous access to the most demanded sites; ISIS 2000 would require teachers to call the help desk every time they want a site reserved, which is simply unworkable in the classroom environment where most often there is no phone. In addition, notwithstanding the fact that the State has over 50,000 teachers, ISIS 2000 proposed a help desk staffed by approximately 5 employees.
- ENA will deliver three hours of Internet access per student per week at 2 pages per minute; ISIS 2000 offers no indication how much capacity it would provide.
- ENA has five security checkpoints; ISIS 2000 has only one or two, although it is difficult to determine from their network diagrams.
- ENA's design is reliable because key functions are dispersed in its service offering; ISIS 2000 combines these functions into one item of equipment, creating a single point of failure.

²⁰ See ISIS 2000 Request at Attachment A.

²¹ See *id.*

- ENA provides the capacity for committed protection from pornography; ISIS 2000 did not demonstrate any capability to provide such protection for all schools.

The fundamental differences between ISIS 2000's and ENA's response to the State's request for proposal underscore the superiority of ENA's solution. ISIS 2000 essentially proposed a state-owned and operated network, with ISIS 2000 serving as the purchasing agent for the equipment and the leased-line communications services. This approach improperly requires the State to bear the risk of the substantial investment in equipment used to obtain Internet access, which may later either fail to meet its growing needs or become obsolete in an industry where technology changes rapidly. As reflected in the scores for technical merit, the State found that ENA's approach was vastly superior and in the best interests of Tennessee school children. It clearly did not want – and should not be forced on basis of ISIS 2000's proposal – to be in the position of purchasing, operating, and maintaining its own network.

On the other hand, ENA offered an end-to-end Internet access service that better serves the technical needs of the State and the goals of the schools and libraries program. ENA will provide the State with cost-effective Internet access service over the life of the contract to every school in the State, regardless of its resources or how isolated it may be. By using an end-to-end service, the State also will be able to incrementally adjust the level of service, for example, in order to retain a benchmark service level on a per-student basis as demand for service or student enrollment in a particular school changes. In fact, ENA today provides Internet access to over 100,000 computers located in the State's K-12 schools. Further, ENA's approach will advance

Congress's and the Commission's universal service goals of enhancing the learning experience of our nation's school children, while efficiently managing the limited resources of the states and the fund.

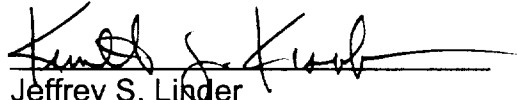
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ISIS 2000's Request does nothing more than perpetuate the confusion and misunderstanding that were engendered by its prior reckless and baseless attacks on the State and ENA. This continued effort to twist the law and the facts serves no apparent end other than to deny the school children of Tennessee effective Internet access. As such, ISIS 2000's Request should be promptly denied.

Respectfully submitted,

EDUCATION NETWORKS OF AMERICA

By:



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April 13, 1999

**DECLARATION OF
ALBERT F. GANIER III**

I declare under penalty of perjury that the foregoing "Opposition of Education Networks of America" is true and correct. Executed on this ___ day of April 1999.

Albert F. Ganier III

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition of Education Networks of America was served today, the 13th day of April, 1999, by first class mail, postage pre-paid on the following parties:

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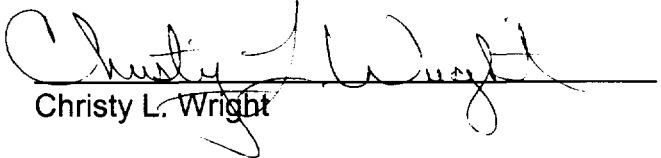
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ATTACHMENT A

**Request for Proposals
Evaluation and Contract Award Provision**

6 EVALUATION AND CONTRACT AWARD

6.1 Proposal Evaluation Categories and Weights

The categories that shall be considered in the evaluation of proposals are Qualifications, Experience, Technical Approach, and Cost. Each category shall be weighted as follows, and one hundred (100) points is the maximum total number of points which may be awarded to a proposal:

Maximum Points Awarded for Proposer Qualifications:	10
Maximum Points Awarded for Proposer Experience:	15
Maximum Points Awarded for Technical Approach:	45
Maximum Points Awarded for Cost Proposal:	30

6.2 Proposal Evaluation Process

6.2.1 The evaluation process is designed to award the procurement not necessarily to the Proposer of least cost, but rather to the Proposer with the best combination of attributes based upon the evaluation criteria.

6.2.2 The RFP Coordinator shall manage the proposal evaluation process and maintain proposal evaluation records. A Proposal Evaluation Team made up of three or more State employees shall be responsible for evaluating proposals.

6.2.3 All proposals shall be reviewed by the RFP Coordinator to determine compliance with mandatory proposal requirements as specified in this RFP. If the RFP Coordinator determines that a proposal may be missing one or more such requirements, the Proposal Evaluation Team shall review the proposal to determine if it meets minimal requirements for further evaluation; if the State shall request clarification(s) or correction(s); or, if the State shall determine the proposal non-responsive and reject it. (See Attachment 9.3, Proposal Requirements Checklist).

6.2.4 The Proposal Evaluation Team shall evaluate proposals determined to have met proposal requirements based upon the criteria set forth in this RFP. Each evaluator shall score each proposal. The evaluation scoring shall use the pre-established evaluation criteria and weights set out in this RFP. Each evaluator shall use only whole numbers for scoring proposals. (See Attachment 9.4, Technical Proposal Evaluation Format).

6.2.5 The State reserves the right, at its sole discretion, to request clarifications of proposals or to conduct discussions for the purpose of clarification with any or all Proposers. The purpose of any such discussions shall be to ensure full understanding of the proposal. Discussions shall be limited to specific sections of the proposal identified by the State and, if held, shall be after initial evaluation of Technical Proposals. If clarifications are made as a result of such discussion, the Proposer shall put such clarifications in writing. If clarifications are requested and written after the Proposal Evaluation Team has scored a subject Proposal, the evaluators may re-score the clarified Technical Proposals.

6.2.6 Upon completion of Technical Proposal scoring by the Proposal Evaluation Team, the RFP Coordinator shall calculate the average Technical Proposal score for each proposal.

6.2.7 After opening the Cost Proposals, the RFP Coordinator shall calculate scores for each Cost Proposal. (See Attachment 9.5, Cost Proposal Evaluation Format).

The Cost Evaluation scores shall be based on the amount indicated in the Cost Proposal for State and Local funds combined with FCC E-Rate funds paid to the proposer. State and Local funds may be augmented by Other Funding specified and offered by proposer and by any Savings generated from State and Local funds. These amounts shall be used in the following formula to determine the Cost Factor

toward calculating the points a Proposer shall receive for the Cost Proposal:

Total State & Local, Other Funds, Savings and FCC funds paid to proposer divided by Total State and Local Funds, excludes Savings, FCC, Other Funds equals the Cost Factor of Proposal Being Evaluated.

Proposal with the Highest Cost Factor is awarded 30 points for Cost Proposal.

This factor can be improved by *decreasing* "Total State and Local funds", or *increasing* "Total State, Local, Other Funding, Savings and associated FCC funds paid to proposer" or accomplishing both. Under no circumstance can the Total State and Local funds exceed amount specified in Cost Proposal Format. Under every circumstance the Proposer's total submitted costs to the FCC will be discounted 60%, which has been changed to 66% in the RFP 97-2 Amended as the state specified aggregate percentage.

Every other proposal is awarded points based on the following ratio: Factor of Proposal Being Evaluated divided by Highest Cost Factor. Then the ratio is multiplied by the Maximum Cost Points:

Cost Factor of Proposal Being Evaluated divided by Highest Cost Factor multiplied by Maximum Cost Points equals Points for Proposal Being Evaluated

Example:

Proposal # 1: Combined State, Local & FCC = \$12,500,000. State and Local total is \$5,000,000. Cost Factor = $\$12,500,000 / \$5,000,000 = 2.5$.

Proposal # 2: Combined State, Local, Other and Savings = \$13,125,000. State and Local is \$4,750,000. Cost Factor = $\$13,125,000 / \$4,750,000 = 2.763$. This is determined to be the Highest Cost Factor.

Highest Cost Factor of 2.763 for Proposal # 2 is awarded 30 points. Proposal # 1 is awarded points by the ratio of $2.5 / 2.763 = .905$. This ratio multiplied by the Maximum Cost Points equals 27.14 Cost Points.

- 6.2.8 The RFP Coordinator shall combine the average Technical Evaluation scores with the Cost Evaluation scores for each Proposer. (See Attachment 9.6, Proposal Score Summary Matrix).
- 6.2.9 All proposal evaluation calculations shall result in numbers rounded to the nearest three decimal places (e.g., 9.999).
- 6.3 **Contract Award**
 - 6.3.1 The RFP Coordinator shall forward results from the proposal evaluation process to the head of the procuring agency for a contract award decision. Contract award decisions shall be subject to the approval of appropriate State officials in accordance with applicable State laws and regulations.
 - 6.3.2 The State reserves the right to make an award without further discussion of any proposal submitted. There shall be no best and final offer procedure. Therefore, each proposal should be initially submitted on the most favorable terms the vendor can offer.
 - 6.3.3 After the evaluation of proposals and contract award decision, the head of the procuring agency shall issue a written *Notice of Intent to Award* to all evaluated Proposers. The notice shall identify the proposal selected for award. However, any *Notice of Intent to Award* shall not create rights or interests in any vendor.
 - 6.3.4 Upon release of a written *Notice of Intent to Award* the RFP files shall be made available for public inspection.

- 6.3.5 The State reserves the right, at its sole discretion, to further clarify or negotiate with the best evaluated Proposer subsequent to *Notice of Intent to Award*.
- 6.3.6 The apparently successful Proposer shall be expected to enter into a contract with the State which shall be substantially the same as the *pro forma* contract included in Section Eight of this RFP. However, the State reserves the right to add terms and conditions, deemed to be in the best interest of the State, during contract negotiations. Any such terms and conditions shall be within the scope of the RFP and shall not affect the proposal evaluations.
- 6.3.7 If the selected Proposer fails to sign and return the contract drawn pursuant to this RFP within fourteen (14) days of its delivery to the Proposer, the State may determine, at its sole discretion, that the Proposer has failed to enter into a contract with the State in accordance with the terms of this RFP, and the State may open negotiations with the next best evaluated Proposer.